

Information Commissioner's Office

Consultation:

Direct Marketing Code

Start date: 8 January 2020

End date: 4 March 2020

Introduction

The Information Commissioner is producing a direct marketing code of practice, as required by the Data Protection Act 2018. A draft of the code is now out for public consultation.

The draft code of practice aims to provide practical guidance and promote good practice in regard to processing for direct marketing purposes in compliance with data protection and e-privacy rules. The draft code takes a life-cycle approach to direct marketing. It starts with a section looking at the definition of direct marketing to help you decide if the code applies to you, before moving on to cover areas such as planning your marketing, collecting data, delivering your marketing messages and individuals rights.

The public consultation on the draft code will remain open until **4 March 2020**. The Information Commissioner welcomes feedback on the specific questions set out below.

You can email your response to directmarketingcode@ico.org.uk

Or print and post to:

Direct Marketing Code Consultation Team
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire SK9 5AF

If you would like further information on the consultation, please email the [Direct Marketing Code team](#).

Privacy statement

For this consultation we will publish all responses received from organisations except for those where the response indicates that they are an individual acting in a private capacity (eg a member of the public). All responses from organisations and individuals acting in a professional capacity (eg sole traders, academics etc) will be published but any personal data will be removed before publication (including email addresses and telephone numbers).

For more information about what we do with personal data please see our [privacy notice](#)

Q1 Is the draft code clear and easy to understand?

☒ Yes

☐ No

If no please explain why and how we could improve this:

Generally, the draft code is clear to understand, but there are several areas where it can be improved to be as useful a resource as possible to help the BHF and the wider charity sector comply with GDPR and PECR in their direct marketing practice.

We note that there is a shift away from the principle led guidance present in all earlier publications, towards a much more prescriptive framework. This move may result in organisations moving away from undertaking their own balancing exercises and not affording organisations the opportunity to judge what is reasonable.

We also have concerns over some of the 'good practice' recommendations. Most obviously around getting '*consent for all your direct marketing regardless of whether PECR requires it or not*'. The inclusion of the recommendation to get consent is very likely to mean that organisations (and in particular charities) will read this as being the only real choice available and adopting a consent approach by default. This may not be in the best interests of the organisation or the data subjects.

The word 'unlikely' is used 26 times in the draft code. The use of such wording makes it difficult for readers to interpret and apply. We recommend that if something is deemed 'unlikely' in general terms, there should be at least two examples provided in specific areas to help organisations understand where it might be more likely to be fair.

On occasions, the draft code is inconsistent in approach. For example, the draft code says that when determining whether a communication is service or marketing in nature "a key factor is likely to be the phrasing, tone and context". Later in the draft code, it says that organisations cannot "avoid the direct marketing rules by simply using a neutral tone". It would be helpful to have clarity around this.

The examples in the draft code can help to illustrate points and put general assertions into context. However, we believe that the use of the examples could be enhanced. Often an example is given at the end of a section which tells you how an activity would not be likely to be compliant. The guidance would be hugely enhanced if the examples also included how that same activity could, potentially, be done fairly and lawfully.

Q2 Does the draft code contain the right level of detail? (When answering please remember that the code does not seek to duplicate all our existing data protection and e-privacy guidance)

☒ Yes

☐ No

If no please explain what changes or improvements you would like to see?

On the whole yes.

Q3 Does the draft code cover the right issues about direct marketing?

☒ Yes

☐ No

If no please outline what additional areas you would like to see covered:

Yes overall.

However, we believe that consistency with existing ICO guidance needs to be addressed. The presentation of the current online guidance with its focus on accountability, good decision-making, an evidence-based approach, is much more helpful as a guide to help charities understand the legal requirements and adopt a principles-based approach based on fair and transparent practice.

In addition, in our view the existing online ICO guidance dealing with the 'Lawful basis for processing' is much clearer for organisations. Explaining that no single basis is better or more important than the others gives a clearer and more accurate explanation of the law.

Q4 Does the draft code address the areas of data protection and e-privacy that are having an impact on your organisation's direct marketing practices?

☒ Yes

☐ No

If no please outline what additional areas you would like to see covered

Yes, it does overall but we have the following concerns specific to the BHF and the charity sector:

Social Media and Consent – the draft code states “*an individual may want as many people as possible to read their social media post but that does not mean they are agreeing to have that data collected and analysed to profile them to target your direct marketing campaigns.*” Our view is that this assertion is too general to properly encompass all social media platforms and the different interactions across these platforms. Arguably, platforms like Facebook and Twitter have different functions, and users are likely to have different expectations of how their data may be used. It would be useful if the draft code could differentiate between social media platforms.

Custom audience initiatives – the draft code says that it is likely that consent is the appropriate basis for advertising via custom audiences, as it is difficult to see how custom audience tools ‘*would meet the three-part test of the legitimate interest basis*’. A further explanation would be helpful to explain the reasoning for the ICO’s conclusion.

Direct Marketing and Consent - The draft code recommends that organisations get consent for all direct marketing regardless of whether PECR requires it or not. This is at odds with the ICO’s current guidance on direct marketing which states that one legal basis is not necessarily superior to another. This recommendation could lead organisations to believe that they should obtain consent for all direct marketing (even where it is not legally required).

Direct Marketing by post – the draft code implies that organisations will need to have a pre-existing relationship with an individual to send them marketing by post if relying upon the legitimate interest basis. However, under the GDPR and Data Protection Act 2018 organisations can send post using legitimate interest, irrespective of whether they have a pre-existing relationship with the individual. Whilst the draft code provides some helpful guidance for organisations carrying out legitimate interest assessments in practice, the code should be clearer when explaining where legitimate interest can be used as the appropriate legal ground.

Data matching/profiling – the draft code says that organisations are unlikely to be able to justify tracking services to find the new addresses of individuals’ who have moved. For example, ICO states that a university would not be allowed to use a data broker to find updated address details for its alumni. This is a conservative view worthy of review in the consultation.

Profiling – The ICO refers to types of profiling you consider to be ‘intrusive’ but it is unclear what the ICO regards as the threshold for this – particularly where it will be difficult to rely on legitimate interests because the profiling will not be in the reasonable expectations of data subjects. Philanthropists and high net worth individuals often expect an organisation to have conducted research on them. This element of expectation and informing supporters of profiling in an appropriate and timely fashion, should be included in the draft code.

Tell a friend (refer a friend) campaigns- According to the guidance ‘tell a friend’ campaigns are hard to justify under PECR. The draft code says ‘it is very likely therefore that viral marketing and ‘tell a friend’ campaigns by electronic mail would breach PECR’.

We believe that this could have unintended negative consequences on a whole range of charitable fundraising, campaigning, and service delivery work. We feel that the information on what is ‘incentivising vs instigating’ should be clearer.

Q5 Is it easy to find information in the draft code?

☒ Yes

☐ No

If no, please provide your suggestions on how the structure could be improved:

Q6 Do you have any examples of direct marketing in practice, good or bad, that you think it would be useful to include in the code

☒ Yes

☐ No

If yes, please provide your direct marketing examples:

The draft code says that 'any unusual or unexpected processing ought to be at the forefront of any layered privacy information'. An example as to how organisations can do this on a practical level would be helpful.

The draft code says that where possible, organisations should provide granular consent options for different types of processing. But it also says that requests should be concise and easy to understand. It would be useful to have examples of how organisations could achieve both aims simultaneously.

Q7 Do you have any other suggestions for the direct marketing code?

In our opinion, the charity sector is over-represented in the examples given. 11% of the examples within the draft code relate to charities. This is a disproportionate number given the range of organisations and businesses that undertake direct marketing. We would like to see a wider range of examples considered.

About you

Q8 Are you answering as:

- ☐ An individual acting in a private capacity (eg someone providing their views as a member of the public)
- ☐ An individual acting in a professional capacity
- ☒ On behalf of an organisation
- ☐ Other

Please specify the name of your organisation:

British Heart Foundation

If other please specify:

Q9 How did you find out about this survey?

- ☐ ICO Twitter account
- ☐ ICO Facebook account
- ☐ ICO LinkedIn account
- ☒ ICO website
- ☐ ICO newsletter
- ☐ ICO staff member
- ☐ Colleague
- ☐ Personal/work Twitter account
- ☐ Personal/work Facebook account
- ☐ Personal/work LinkedIn account
- ☐ Other

If other please specify:

Thank you for taking the time to complete the survey